No. 71-9441

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

MORRIS SALETKO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Morris Saletko, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 30, 1971.

Opinion Below

The judgment of conviction in the United States District Court for the Northern District of Illinois is not reported. The Opinion of the Court of Appeals for the Seventh Circuit has not yet been officially reported. It is printed as Appendix "A" to this Petition.

Jurisdiction

The judgment of the Court of Appeals was entered on November 30, 1971. A timely petition for rehearing was denied on December 23, 1971; it is printed herein as Appendix "B".

The jurisdiction of this court is invoked under 28 U.S. Code 1254(1).

Questions Presented

1. Does not limitation on the right to cross-examine the only witness against defendant as to his nature of employment and place of residence violate defendant's Sixth Amendment right where the government made no showing that answers to such questions would jeopardize the safety of the witness?

2. Do not the holdings by this court in *Alford v. United States*, 228 U.S. 687 (1931), *Smith* v. *Illinois*, 390 U.S. 129 (1968) and *Garofolo* v. *United States*, 390 U.S. 144 (1968) compel reversal where the limitation on cross-examination of the government's only witness against defendant as to his alleged criminal participation prejudice his right to a fair trial?

3. Where the government's chief witness procured perjured testimony on his behalf in a bank robbery trial where he was defendant, is it not a violation of petitioner's right to a fair trial for the court to refuse to instruct the jury, in some manner, to take such fact into consideration in determining the witness's credibility?

4. And, as a corollary, was it not error to instruct the jury, over objection, as to defendant's special interest in the outcome of the case, where such instruction has been criticized by the Seventh Circuit which merely "prefers" that the defendant not be singled out.

Constitutional Provision Involved

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

Statement of the Case

Tried to a jury on a charge of possession of goods he knew to have been stolen in interstate commerce in violation of 18 U.S. Code 679, petitioner was convicted and sentenced to 8 years. The sentence was held by the Court of Appeals to be excessive in light of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), because when defendant was convicted at his first trial involving the same matter, the same trial court imposed a 5 year sentence. The conviction was otherwise affirmed.

The Government's Evidence

Government witness Patrick Schang testified that on August 23, 1964 he and others hijacked a shipment of goods moving in interstate commerce. He testified he sold boxes of Polaroid film, a part of the goods from the hijacked truck, to the defendant on August 28, 1968 in Chicago, Illinois and that in early September, 1964 defendant paid him and one, Angelo Boscarino,[1] about $16,000 for the film.

Schang testified he was a hijacker and had been convicted of felonies—one for bank robbery and another for hijacking trucks. He had been sentenced to 15 years in the bank robbery case, but the sentence was later changed to 5 years probation; he was also granted probation in the hijacking case. (A. 44)[2]

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[1] Boscarino did not testify at the trial, because he was deceased.

[2] "A". refers to the printed Appendix as filed in the Court of Appeals.

Cross Examination of Schang.

On cross examination, Schang admitted he robbed the Franklin Park Bank in Franklin Park, Illinois on September 23, 1963, and that at the time he was on trial for that offense in the District Court, a Stone Park, Illinois police Lt., Anthony Amatore, testified falsely on his behalf that at the time of the bank robbery he was elsewhere in some restaurant (A. 6-7).

The restriction on the cross examination of Schang regarding his employment and residence address.

To the inquiry of what he did for a living, Schang answered he was in "general sales". Defense counsel inquired, "In what field? What merchandise do you sell?" The government objected "to further inquiry beyond that point", and the court sustained the objection stating, "We will discuss this sometime later as to what he sells. I don't think that has any relevancy. Objection sustained subject to an offer of proof to be made by the government". (A. 8).

Schang stated he was in general sales for about four years commencing March, 1966, and had two different employers, the present one becoming his employer about two years before. (A. 8-9).

> "Q. Prior to the place where you are living now, what was the address where you were living before the address where you are living now?
>
> Mr. Etten (Prosecutor): Objection, your Honor. The government is prepared to make an offer of proof that the two addresses are extremely close together.
>
> The Court: All right. The objection is—subject to your offer of proof, the objection is sustained." (A. 9).

The prosecutor's statement of the location of Schang's prior address.

The government prosecutor stated he was prepared to make a showing as to non-disclosure of Schang's employment and address. Defense counsel only sought Schang's prior address and the prosecutor stated that the present address and the prior address were so close, two blocks—or a mile away, that "if we would reveal one, we would reveal the other." (A. 15). The court inquired whether defense counsel would accept the representation of the prosecutor that Schang would establish "that his two addresses are within blocks of each other." (A. 16).

Counsel accepted the government's representation, but asked permission to continue cross-examination of Schang with respect to when he was last employed and pointed out that defense counsel accepted the government's representation when they advised the court that within the last two weeks that Schang recently obtained a new job and that was why they needed a continuance because he could not leave a new job. (A. 16). Defense counsel pointed out that the prosecutor stated on this prior occasion in requesting a continuance that Schang had just obtained new employment; but, it turned out not to be new employment. (A. 16).

The prosecutor advised the court that he was so informed by an FBI agent, but that the prosecutor himself had no idea where Schang was employed. The court asked, "Well, why did you make that representation?" The prosecutor replied that FBI agent Ford told him that Schang's employment was changed. (A. 16).

Without swearing in agent Ford, the court inquired of him whether there was an essential difference in the type of employment in which Schang was now engaged from what he was engaged in in the past two years, Ford said

it was the same. (A. 17). Defense counsel asked if he could examine agent Ford, and the court said, "Sometime later." (A. 17).[3]

Mr. Etten, the prosecutor, also corrected another misstatement he had made to the court regarding the proximity of Schang's present and former address. The prosecutor advised the court that in a different case in which Schang testified on January 28, 1970, Schang stated that when he moved from one residence to another that "They were a couple of miles apart." (A. 18).

Defense counsel then stated, "I submit that we are entitled to know the previous address for the good purpose we may inquire amongst neighbors and friends what the activities—what activities they knew he is engaged in. Now, that is the purpose, that is the sense that we get from *Alford*, from *Smith*." (A. 18-19).

The court stated it would not permit any inquiry as to his previous address, even two miles from his present address. Defense counsel asked if he could inquire with respect to the details of Schang's job and present employment, stating "We don't even know what he is selling." The court denied the request. (A. 19).

Evidence on behalf of Defendant

Defendant testified he was 55 years of age, lived in Lincolnwood, Illinois, with his wife and two children; that he worked at the H & H Restaurant for about 13 years as a buyer, cashier and delivering orders, and that he was also in the Christmas tree business and in the watermelon business during the appropriate seasons. He knew Schang and Boscarino as customers in the restaurant.

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[3] Counsel was never permitted to examine Agent Ford.

He denied he ever bought Polaroid film from Schang and/or Boscarino or that he ever paid or gave either of them $16,000, or that he ever gave or sent them any money for any purpose. (A. 23).

In September or October, 1964, Schang came into the restaurant in the afternoon and asked the defendant if he would be an alibi witness for him in a bank robbery; defendant told him "No, I don't lie for you or anybody else", whereupon Schang left the restaurant. (A. 23). Sometime in August, 1964, Schang had telephoned him to ask if they could get a truck into a garage, and defendant made arrangements for the truck at the garage, three doors east of LaSalle Street on Lake Street, where defendant was a customer. There was some trouble with getting the truck into the rear door. He did not look inside the truck, nor did he know the contents of the truck, and had nothing to do with the truck once it was in the garage. (A. 24).

At the time of his testimony, the defendant was in the commodity business. (A. 24).

REASONS FOR GRANTING THE WRIT

1.

The petitioner was restricted in his Sixth Amendment right to cross-examine the chief government witness on material issues.

When Patrick Schang was cross-examined in this case, he was asked for his address "prior to the place where you are living now . . ." (A. 9). The government's objection was sustained upon the representation that "the two addresses are extremely close together." (A. 9). Outside the presence of the jury, the prosecutor advised the court that Schang formerly lived within two blocks of his present address. (A. 15). Later in the proceedings, the prosecutor advised the court that he was mistaken, and that Schang lived within a couple of miles of his present address. (A. 18).

Additionally petitioner was limited in cross-examining Schang about the nature of his employment. Schang had testified that he was in "general sales". (A. 8). When asked, "What merchandise do you sell?", the government's objection was sustained. The court stated, "I don't think that has any relevancy. Objection sustained, subject to an offer of proof to be made by the government. (A. 8). (The government never made any offer of proof).

Schang testified he held the same job for about two years. (A. 9). Although, at a hearing on February 2, 1970, when petitioner demanded trial and moved for a dismissal of the indictment, the government represented that the reason for its request for a continuance was that Patrick Schang had just previously testified in a trial commencing

January 26, 1970, that Schang had just obtained new employment, and to take him away from the job now would be unfair. (A. 16).

Sometime later, the prosecutor advised the court (outside the presence of the jury) that he obtained the incorrect information about Schang's new employment from FBI agent Ford. (A. 16). The court inquired of agent Ford, not under oath, who advised the court that Schang's job was more or less the same, that it was in the same general area. (A. 17).

For like reasons, the conviction first affirmed by the Court of Appeals in *United States* v. *Garafolo*, 385 F.2d 200 (7 Cir., 1967), was reversed and remanded, *per curiam*, in *Garafolo* v. *United States*, 390 U.S. 144 (1968), in light of *Smith* v. *Illinois*, 390 U.S. 129 (1968).

It is important to note that in the first affirmance of *Garafolo*, the Court of Appeals rejected the argument that limitation on cross-examination of the government's chief witness was error, because:

> ". . . his prior murder case, his prior arrest for carrying a gun without a permit, his employment record and his arrest for sale of narcotics shortly before he became cooperative with narcotic agents were brought out on direct and cross-examination.
>
> ". . . In light of the wide latitude allowed on cross-examination, the trial court's refusal to permit cross-examination concerning Haney's residence at the time of trial was not prejudicial error. Haney was sufficiently identified with his community to enable appellant to investigate his reputation for truth and veracity in that community. His personal character was deeply probed by defense counsel."

This Court, nonetheless, reversed for failure to permit examination on present address.

It was never made clear how the specifics of Schang's claimed "general sales" employment could in any way endanger him. Nor, does an address two miles from his present abode conceivably prejudice him.

Thus, the clear admonitions by this Court in *Alford* v. *United States*, 282 U.S. 687 (1931), *Smith* v. *Illinois*, 390 U.S. 129 (1968) were not heeded.

The Appellate Court opined that *Alford* and *Smith* were not applicable because the trial court was aware of possible personal danger to the witness Schang if he were to have revealed the address where he was living prior to his present address and if he were to have revealed the nature of his employment.

It is merely guess work and speculation on the part of the trial judge that revealing his address within two miles of where Schang lived would irrefutably lead to knowledge of his present whereabouts.

But aside from that, what right does a trial judge have in restricting defendant from trying to learn on cross-examination what the nature of Schang's employment was—other than "in general merchandise"? We can envision multiple questions on cross-examination testing Schang's credibility in relation to what line of merchandise he was selling—even without revealing the identity of his employer. We could have inquired into certain aspects of his knowledge of the field of merchandising, in which he claimed to have been engaged.

And in that connection, because petitioner was limited in finding out what particular sales activity Schang was engaged in, how can this court sanction the prosecutor's prejudicial argument, vouching for Schang's truth-telling attributes, by telling the jury:"

> ". . . and he told fully and openly of his past life . . ." (A. 32)

Of course, Schang did no such thing; as the jury was not permitted to know anything of his activities within the past four years, except that he was in "general sales".

Certiorari should be granted to re-affirm *Alford, Smith* and *Garafolo*, which the Appeals Court apparently chooses not to follow.

2.

Petitioner was prejudiced in his right to a fair trial when the court refused to instruct the jury that Schang's procurement of perjured testimony should be taken into consideration in determining his credibility.

Petitioner contended that Schang was a procurer of perjured testimony for Schang's prior bank robbery trial. (A. 6-7) He attempted to present evidence in this regard by demonstrating that Schang was in fact guilty of prior bank robbery and that false alibi evidence was presented for Schang during such bank robbery trial.

Petitioner also presented his own testimony that Schang had attempted to induce him to give false testimony at Schang's prior bank robbery trial (A. 23).

Petitioner desired to have the court instruct the jury that such prior obtaining of perjury by a witness and the attempt of the witness to obtain perjury, affected Schang's credibility. He submitted to the court 6 separate instructions, attempting to state such proposition in a manner which would be acceptable to the court. (A. 2-3). Such offered instructions read:

> The court instructs the jury that if a witness, upon the occasion of another trial, has introduced testimony of another person, knowing at the time when he introduced it that such testimony was false, the jury may take that fact into consideration in deciding to what

extent the witness who previously employed false evidence may be believed.

The jury is instructed that if the witness, Patrick Schang, at another trial, permitted erroneous testimony as to his whereabouts to be introduced into evidence which would establish an alibi, without taking any steps to correct the same, he knowing that such testimony of his whereabouts to have been in error, you may take that fact into consideration in determining Schang's credibility in this case.

You have heard testimony that at the bank robbery trial of witness Schang, a witness testified that Schang was someplace else at the time of the robbery. You have also heard the testimony of Schang that he was implicated in the bank robbery and that he was found guilty of that offense. If you believe from the evidence that the alibi witness at Schang's bank robbery trial testified falsely with the permission of Schang, or at his invitation and request, then, if you so find, you may take that fact, if it is a fact, into consideration in evaluating the credibility of Patrick Schang.

In this case, the evidence shows that a person testified falsely for the witness Patrick Schang in a different trial in the District Court. If you believe, from all the facts and circumstances of that incident, that Patrick Schang procured that false testimony, you are instructed to scrutinize his testimony in this carefully.

I instruct you that you must view with great care and caution the testimony of a witness who knowingly allows the use of false testimony at his own trial. That is, if a witness has been a defendant at another trial and that person has knowingly allowed the use of false testimony on his behalf then this is a factor which you may properly consider in weighing his credibility.

You have heard testimony that the witness Schang allowed a witness at his bank robbery trial to testify that Schang was someplace else at the time of the

> robbery. You are instructed that the testimony of a person who knowingly allows false testimony to be used at trial must be viewed with special care and caution. (A. 2-3).

Not all the instructions were intended to be given. The court had requested counsel to draft an instruction which would cover the situation (Tr. 284-287). The submission of the 6 instructions was an attempt to comply. Defense requested that any one of the instructions be given (Tr. 287).

As the court stated in *United States* v. *Varelli*, 407 F.2d 735 (7 Cir.), at 751:

> "Since perjury would be relevant to the witness' veracity, cross-examination should be allowed on retrial."

To a limited extent, cross-examination was allowed. But the defendant was entitled to have the jury instructed with respect to the evidence produced on cross-examination.

The law is clear that the defendant is " . . . entitled to have instructions presented relating to any theory of the defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be." *United States* v. *O'Connor*, 237 F.2d 466, 474, n 8 (2 Cir., 1956).

In the instant case, as demonstrated above, there was offered evidence both that Schang had suborned perjury at his prior trial (A. 6-7) and had attempted to suborn perjury (A. 23). Although it was for the jury to determine whether such subornation of perjury had occurred, it was necessary for the court to instruct the jury as to the effect of such subornation on the witness' credibility at the instant trial.

The Seventh Circuit has now filed an opinion on this point in direct conflict with the Third Circuit.

In *United States* v. *Barasso*, 267 F.2d 908 (3 Cir. 1959), the court stated, pp. 909-910:

"The witness Fergerson testified against the appellants after an earlier separate trial had resulted in his conviction of the robbery in question. At the present trial, contradicting his testimony at his own trial, he gave a detailed account of the robbery, identified the appellants as his companions in the enterprise, and specified the role of each during and before the actual robbery. He admitted that he had perjured himself in his testimony at his own trial.

"In these circumstances counsel for the appellants submitted to the court a request for instructions, reading:

> 'Fergerson's admission that he wilfully committed perjury and false swearing at his trial, while it does not disqualify him as a witness, yet it does seriously impair his testimony.'

"However, the trial judge did not give this requested instruction, neither did he make any mention in his charge to the significance of admitted perjury as affecting credibility.

"On this appeal the government urges that the court acted properly because the requested instruction was technically inaccurate. It should have been so phrased as merely to inform the jury that the admitted perjury of the witness was to be given serious consideration in their determination of his credibility, without stating as a conclusion of the court that his credibility had been impaired by this perjury. How significant that difference is, we need not decide. *For, in any event the court was alerted to the desire of the defendants for an instruction as to the bearing of admitted perjury about this very crime on the credibility of the account now given by the witness.*

"Such an instruction would certainly have been appropriate. Beyond that Chief Judge Biggs, speak-

ing for this court, pointed out in United States v. Margolis, 3 Cir., 1943, 138 F.2d 1002, 1004, that where a witness has been guilty of perjury, '[t]he court must charge that the testimony of such a witness must be scrutinized with care.'

"The government also points out that the court did warn the jury to scrutinize the testimony of Fergerson carefully. But the stated basis of this admonition was Fergerson's conviction of robbery. Actually, his admitted perjury pointed more directly to testimonial unreliability. Therefore, having been requested to charge on this matter, the court should have done so. We conclude that under United States v. Margolis, supra, the court erred in failing after request to instruct the jury to take seriously into account the admitted perjury of Fergerson in determining whether his present testimony on the same subject merited belief." (Emphasis added)

In holding *Barasso* not applicable, the Seventh Circuit ignored the evidence that Schang procured Lt. Amatore to testify as to a false alibi.

All of the six tendered alternate instructions (A. 203) referred only to Schang's having procured perjured testimony at his bank robbery trial.

The law is that so long as there is any evidence in support of defendant's theory the jury must be instructed on every relevant issue of law. *United States* v. *Anost*, 356 F.2d 413 (7 Cir. 1966); *United States* v. *Indian Trailer Corp.*, 226 F.2d 595, 600 (7 Cir. 1955); *Levine* v. *United States*, 261 F.2d 747, 748 (D.C. Cir. 1958); *United States* v. *O'Connor*, 237 F.2d 466, 474 n. 8 (2 Cir. 1956).

Accordingly, because the sole issue in the case was Schang's credibility, the refusal to instruct on this material issue was more than "slight trial court error" which interfered with the fact finding function of the jury, and therefore Certiorari should be granted.

3.

This court ought now to discountenance an instruction advising a jury that although defendant has a right to testify, the jury should "consider the fact that the defendant has a vital interest in the outcome of this trial".

Although the trial court refused to give any instruction with respect to Schang's subornation of perjury, it did instruct, over defendant's objections (Tr. 283)[1]:

> "Now, the defendant who wishes — the defendant in this case who wished to testify and did testify is a competent witness and his testimony should not be disbelieved merely because he is the defendant. However, in weighing his testimony you consider the fact that the defendant has a vital interest in the outcome of this trial."

The court had already given a general instruction on the credibility of the witnesses, including the defendant, stating:

> "Now, in this case it is your province to determine which witnesses you are going to believe. You determine the credibility of each witness and the weight to be given to his testimony. In weighing the testimony of each witness you should consider his relationship to the Government or to the defendant; the witness' interest, if any, in the outcome of the case, his manner while testifying, his candor, his fairness, his intelligence and the extent to which he has been corroborated or contradicted, if at all, by other credible evidence." (Tr. 315).

We submit that an instruction on defendant's vital interest in the outcome of the case is reversible error, *per se*. Although in *United States* v. *Reid*, 410 F.2d 1223, 1227 (7

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[1] "Tr." refers to trial Transcript of Proceedings as filed in the Court of Appeals.

Cir. 1969) the court criticized the instruction on defendant's interest under circumstances there outlined, and did not hold — because it was not asked to hold that an instruction on defendant's interest on the outcome of the case was reversible error *per se* — we submit that such an instruction is unfair to a defendant and further, under the circumstances of the case at bar, the instruction was defective.

The only real issue in the case was the credibility of Schang as against that of the petitioner.

In *Reid*, " . . . the prosecutor took every opportunity to emphasize the inherent credibility of the government's employees." (410 F.2d 1227).

In the case at bar the prosecutor called upon the jury to believe Schang because, ". . . . I believe he told fully and openly of his entire involvement of that hi-jacking on August 24, 1964 . . . He came back here to tell you the truth about what happened back then in August of 1964 at the great personal cost of having again to bare his past life." (A. 32).

And again, "Patrick Schang came here and told the truth, and by coming here I think that he became, under these circumstances, a more decent human being. I believe that and I think that you will believe that and I think that you will find this defendant guilty as charged in the indictment." (A. 33).

Thus, as in *Reid*, p. 1228,

> " . . . the jury might have been led to believe by the prosecutor's final argument that relationship to the Government was an assurance of truthfulness while the special instruction as to the defendant's interest in the outcome served to impress upon the jury that relationship to the defendant cast doubt upon the reliability of testimony."

Although the self-interest instruction was criticized in *Taylor* v. *United States*, 390 F.2d 278, 285 (8 Cir., 1968), we submit it is time to hold that such an instruction is prejudicial *per se* and to follow the suggestions in *Taylor* that the instruction proposed by Mathes and Devitt, Fed. Jury Practice and Instructions, Sec. 9.12 (1965) should be given, namely: "A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness."

Certiorari should be granted to determine how juries should be instructed when a defendant testifies. It is now not clear.

There is no solace for petitioner to learn that the Seventh Circuit Court of Appeals agrees with his contentions here, where the court would not reverse for the offending instruction. The Court of Appeals expressed a preference in any future trials "that the defendant not be singled out" (App. A, p. 10, n. 4). One cannot know whether the "preference" of the Court of Appeals will be mandated in the form of an enforcible decision, or whether the "preference" in the future will be disregarded by trial judges.

Only a pronouncement from this court on the subject will eliminate the obvious prejudice to a defendant who testifies.

(And we point out that the error is the more egregious when the trial court refused to instruct the jury in any manner on Schang's procurement of false testimony in his own trial).

Conclusion

Because the issues here are of general importance to the administration of criminal justice and because the holding by the Seventh Circuit refuses to follow a line of authority in this Court (in one of which cases this Court reversed the Seventh Circuit Court of Appeals for the same reason as complained here, *Garafolo* v. *United States*, 390 U.S. 144), we submit the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1971

No. 18451

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MORRIS SALETKO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
69 CR 415

HON. BERNARD M. DECKER, *Judge.*

NOVEMBER 30, 1971

Before SWYGERT, Chief Judge, HASTINGS, *Senior Circuit Judge*, and KERNER, *Circuit Judge.*

KERNER, *Circuit Judge.* Morris Saletko was found guilty by a jury on a single count indictment charging him with the possession of goods known to have been stolen from interstate commerce in violation of 18 U.S.C.

§659.[1] The district court imposed a sentence of eight years and the defendant has appealed.

This is defendant's second conviction and appeal arising out of the same incident. Saletko and 17 others were first indicted in 1966 for conspiracy and possession of goods stolen from interstate commerce. He was convicted of both conspiracy and possession and sentenced to 5 years on each count, and sentences to run consecutively. That conviction was reversed by this court, *United States* v. *Varelli*, 407 F. 2d 735 (7th Cir. 1969). A new indictment charging only the possession of stolen goods was returned in 1969. It is the appeal from the conviction on that charge which is now before us.

Both convictions arose from the 1964 hijacking of a truck belonging to the Spector Freight Systems. The truck contained a shipment of Polaroid film from the Polaroid Corporation in Massachusetts and was destined for the Polaroid plant in Melrose Park, Illinois. The defendant, while not charged with participation in the theft, is alleged to have purchased the film from two of the hijackers. The hijackers, Patrick Schang and Angelo Boscarino,* were

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[1] 18 U.S.C. §659 states in pertinent part:

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, . . . with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;

* * * * *

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; . . .

* [This is an error of the Court of Appeals. Boscarino did not testify in the trial—only Schang. Boscarino died some years before. Although the error was called to the Appeals Court's attention in the Petition for Rehearing, the error remained, and yet remains, uncorrected.]

called as witnesses by the government and their testimony constitutes the principal evidence offered by the government. Saletko's testimony differs materially from that of Schang and Boscarino.

Patrick Schang testified that he was a hijacker by trade and had been convicted of at least six offenses including hijacking, kidnapping, bank robbery, and the interstate transportation of a stolen automobile. Schang admitted that he had participated in the hijacking of the Spector truck on August 23, 1964, and acknowledged his subsequent conviction for that offense. With regard to the defendant Saletko's involvement, Schang testified that he and Boscarino approached the defendant on August 26, 1964, at the H & H Restaurant in Chicago where he worked as a cashier to discuss the possibility of his buying some of the stolen film. Schang further testified that the defendant indicated that he would be interested and said he would let them know in a day or two.

Schang stated that on Friday, August 28, 1964, Boscarino and another of the hijackers drove the film in a rented truck from Aurora, Illinois, to Chicago. On the way, the rented truck broke down on the Eisenhower Expressway and had to be towed to Chicago. It was taken to the rear of a parking garage next door to the H & H Restaurant where the defendant was present while it was backed into the garage. Schang also stated that the defendant told him to take the truck out the next day and that it would be empty.

About a week later Schang and Boscarino went to the H & H Restaurant where they spoke briefly to the defendant in front of the restaurant and were then taken to the basement where the defendant paid $16,000 for the film. This testimony is partially corroborated by that of

Hugh Heraty, a Chicago Police Officer, who testified that on September 8, 1964, at about 12:35 p.m., he observed Schang and Boscarino get out of a car, enter the H & H Restaurant, and have a conversation with the defendant.

The defendant's version of the events is somewhat different. He testified that he lived in Lincolnwood, Illinois, with his wife and two children and had worked as a cashier at the H & H Restaurant for about 13 years. He stated that he knew Schang and Boscarino as customers in the restaurant, but denied that he had ever bought Polaroid film from them or ever paid them $16,000.

Defendant Saletko did acknowledge that he had spoken to Schang in September or October of 1964; but testified that Schang had come to the restaurant and asked if he would be an alibi witness for him in a trial for bank robbery. The defendant told him, "No, I don't lie for you or anybody else." In addition, Saletko stated that Schang had telephoned him sometime in August of 1964 and asked if he could make arrangements to get a truck into the garage near the H & H Restaurant. The defendant made these arrangements and was present when the truck was backed into the garage, but stated that he neither looked inside the truck nor had knowledge of its contents. He denied that he had had anything further to do with the truck once it was in the garage.

It is clear that this conviction is based upon the jury's assessment of the credibility of government and defense witnesses who gave irreconcilably conflicting testimony. In weighing the defendant's allegations of error, we are mindful of the pervasive role that credibility played throughout this trial. We recognize the danger that even slight trial court error may interfere with the fact finding function of the jury in cases of this nature; but we are

equally aware of the weight which must be given the jury's final assessment of witness credibility where the jury has had the opportunity to both hear the testimony and observe the manner in which it was given.

Defendant urges that he was denied a fair trial by the trial court's restriction of his Sixth Amendment right to confront and cross-examine the government's chief witness, Patrick Schang. This claim is predicated upon the court's refusal to allow defense counsel to question Schang concerning his previous address and his present employment. The basis for this refusal was the trial judge's belief that disclosure of such information would endanger the safety of witness Schang. With respect to the factual basis for such a belief, we note that the trial judge was the same judge who tried the original 17 defendants who were indicted and convicted for conspiracy. We must assume that he had intimate knowledge both of the facts of the case and of the people involved. Indeed, the defendant has not questioned the justification for the trial judge's belief that disclosure would endanger the witness.

The question presented for review is whether the disclosure of the witness' prior address and employer would have allowed the discovery of his present address by those who might harm the witness. The defendant argues that no showing was made which would justify the trial court's refusal and that such refusal prevented him from adequately preparing his defense. He believes that access to that information would have allowed him to discover information necessary for the impeachment of a crucial government witness.

In cases of this nature, it is always difficult to set forth the factual basis for the exercise of the trial judge's

discretion since that information will frequently strip the witness of the very protection sought. In this case, however, the trial judge based his refusal upon the fact that the witness' present address was no more than two miles from the former. The defendant urges that such a distance render discovery highly improbable and that the prejudice to the defendant from the refusal to allow disclosure justifies what he considers a slight risk. The trial judge did not agree, noting, "If there is any purpose at all in protecting a witness, it would be completely ridiculous to let you know a place within two miles of where he lived; by tomorrow morning, certain people who may be interested in finding out where he lives would find it out within the course of one day." We are unconvinced that the judge was incorrect in his assessment.

In *Alford* v. *United States*, 282 U.S. 687 (1931), and *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968), the Supreme Court set forth the general rule which requires disclosure of addresses of witnesses.[2] A specific exception, however, has become well established and it is our opinion that this case falls squarely within that exception. Mr. Justice White noted in his concurring opinion in *Smith*

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[2] Mr. Justice Stewart stated in *Smith*:

> . . . the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself. *Smith* v. *Illinois*, 390 U.S. 129, at 131.

that the threat of danger to a witness would excuse the requirement of disclosure:

> In *Alford v. United States*, 282 U.S. 687, 694 (1931), the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal safety of a witness.
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> *Id.* at 133-34.

Both this and other circuits have followed the exception carved out by Mr. Justice White. *United States v. Haddad*, 432 F. 2d 1112, 1128 (7th Cir. 1970), cert. denied, 402 U.S. 905 (1971); *United States v. Battaglia*, 432 F.2d 1115 (7th Cir. 1970), cert. denied, 401 U.S. 924 (1971); *United States v. Palermo*, 410 F. 2d 468, 472 (7th Cir. 1969); *United States v. Persico*, 425 F. 2d 1375, 1384 (2d Cir. 1970), cert. denied, 400 U.S. 869 (1970); *United States v. Baker*, 419 F. 2d 83, 87 (2d Cir. 1969), cert. denied, 397 U.S. 976 (1970).

It is noteworthy, though not dispositive, see *United States v. Giarratano*, 385 F. 2d 200 (7th Cir. 1967), rev'd 390 U.S. 129 (1968), that the restriction did not prevent the defendant from extensively exploring the character of witness Schang. It was disclosed on cross-examination that Schang was 23 years old and had not been legitimately employed since he was 21; that he was a petty thief, burglar, hijacker, bank robber, and car thief, as well as a twice convicted felon. In addition, there is no indication that defense counsel was not free to examine Schang as to his criminal activities within the period for which information as to his address and employment was not available. Schang's sordid background was exposed to the jury in substantial detail, and while we cannot say that the full extent of his disreputability was

revealed, we believe that whatever prejudice to the defendant resulted from the limitations imposed by the trial judge was outweighed by the necessity of protecting the witness.

The defendant also argues that he was entitled to an instruction dealing with the weight to be given witness Schang's testimony in light of Schang's alleged perjury, and that the refusal of his tendered instruction was reversible error. Witness Schang is alleged to have solicited perjured testimony from the defendant for an alibi defense in a bank robbery case and suborned perjury when a police officer gave false testimony at that trial. Reliance is placed upon *United States v. Barasso*, 267 F. 2d 908 (3d Cir. 1959), in which the Third Circuit reversed a conviction for failure to instruct the jury as to the effect of the admitted perjury of one of the government's principal witnesses. We believe that reliance is misplaced.

Schang was cross-examined as to the defendant's allegation that he sought perjured testimony and repeatedly denied that he had ever spoken to Saletko about the robbery. Herein lies the distinction between this case and *Barasso*. The government witness in *Barasso* admitted to the jury that he had perjured himself in a previous trial and in that situation we have no difficulty embracing the requirement of an instruction dealing with the effect of prior perjury on a witness' credibility. In the situation of this case, however, no admission was made and the facts affecting the witness' credibility were in dispute. We believe that an instruction on the alleged solicitation of perjury for an entirely different trial would have unduly emphasized an issue collateral to those of defendant's trial and that the general instructions on weighing

the credibility of witnesses were sufficient. We note that the court gave multiple instructions on witness credibility[3] and a specific charge regarding Schang:

> Now, subject to the other instructions given to you, if you believe that the witness Patrick Schang directly participated in the commission of the offense charged or in the commission of other offenses, his testimony should be closely examined and weighed with great care.

It is our conclusion that this was sufficient to alert the jury to the questionable character of witness Schang.

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[3] Now, in this case it is your province to determine which witnesses you are going to believe. You determine the credibility of each witness and the weight to be given to his testimony. In weighing the testimony of each witness you should consider his relationship to the Government or to the defendant; the witness' interest, if any, in the outcome of the case, his manner while testifying, his candor, his fairness, his intelligence and the extent to which he has been corroborated or contradicted, if at all, by other credible evidence.

Now, if you believe that any person who has taken the stand, any witness, has wilfully sworn falsely to a material fact in the case, you may disregard his testimony in whole or in part, except insofar as it may have been corroborated by other credible evidence.

Now, the testimony of a witness may be discredited or impeached by a showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of the statements.

Now, it is your province to determine the credibility, if any, to be given to the testimony of a witness who has been impeached. The testimony of a witness may be discredited or impeached by a showing that he has been previously convicted of a felony. Prior conviction does not render a witness incompetent to testify, it merely reflects on his credibility. It is your province to determine what weight, if any, should be given to such prior conviction as impeachment.

The defendant next directs our attention to *Taylor* v. *United States*, 390 F. 2d 278 (8th Cir. 1968), and asks us to rule that instructions involving a testifying defendant's self-interest are prejudicial. Such instructions direct the jury's attention to the defendant's vital interest in his own testimony and caution against uncritical reliance upon such testimony. The court in *Taylor* upheld the self-interest instruction but expressed reservations about it. We are equally troubled by self-interest instructions and believe that Judge Blackmun's (now Mr. Justice Blackmun) suggestion[1] that the defendant not be singled out, but rather included in the general instructions on witness credibility is a sounder procedure. However, we, like the Eighth Circuit in *Taylor*, believe that the self-interest instruction which was given was not so harmful to the defendant in this case as to warrant reversal. The Supreme Court has upheld far stronger instructions on defendants' self-interest in testifying. In *Reagan* v. *United States*, 157 U.S. 301, 304 (1895), the Court found unobjectionable an instruction which directed the jury's attention to the deep "personal interest" of the defendant and the strong temptation "to color, pervert, or withhold

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[1] We do not hesitate to observe, however, that the continuing and frequent attack on an instruction of this kind indicates that its use leaves defense counsel with a troubled mind. We suspect that this discomfort would be alleviated if the defendant were included by reference in the court's general instructions as to all witnesses. We would prefer that the defendant not be singled out. His interest is obvious to the jury. A general reference, such as "including the defendant", should suffice. Or the simple instruction proposed by Maties & Devitt, Federal Jury Practice and Instructions, § 9.12 (1965), namely, "A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness", might be considered for use and should withstand attack of the kind present here. *Taylor* v. *United States*, 390 F. 2d 278, at 285.

facts." This court and those of other circuits have continually upheld instructions on this subject. *United States* v. *McCarthy*, 295 F. 2d 356, 358 (7th Cir. 1961); *United States* v. *Marshall*, 266 F. 2d 92, 95 (7th Cir. 1958); *Nelson* v. *United States*, 415 F. 2d 483, 487 (5th Cir. 1969); *Taylor* v. *United States*, *supra*; *Rimerman* v. *United States*, 374 F. 2d 251, 255-56 (8th Cir. 1967), cert. denied, 387 U.S. 931 (1967); *Foley* v. *United States*, 290 F. 2d 562, 569 (8th Cir. 1961), cert. denied, 368 U.S. 888 (1961). On the facts of this case, we are not inclined to depart from these precedents.

The defendant complains, additionally, of prejudice from certain remarks of the trial judge which are said to have conveyed to the jury the judge's disbelief of the defendant's testimony and from statements made by the prosecutor in closing argument which are urged to have amounted to the prosecutor vouching for the credibility of this witness. We have examined the record closely in these areas and find that a reading within the full context reveals no error in these statements.

Finally, we turn our attention to the question of defendant's sentence. As noted above, the defendant was convicted for the same offense in 1967 and sentenced to 5 years on the possession count. This court reversed that conviction. The case was retried and a second conviction obtained. An 8 year sentence was imposed after the second conviction. We are now asked to review that sentence.

The Supreme Court decision in *North Carolina* v. *Pearce*, 395 U.S. 711, (1969), governs the authority of a trial court to impose a more severe sentence upon a defendant who has successfully appealed the first sentence only to be reconvicted. While the majority in *Pearce* finds no absolute constitutional prohibition under the equal protection and double jeopardy clauses against impos-

ing harsher sentences upon reconviction,[3] the court found that the due process clause places significant limitations upon that power:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.
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> *Id.* at 725-26.

In attempting to follow the dictates of *Pearce*, the trial judge set forth in the record the factual basis which he

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[3] Mr. Justice Douglas and Mr. Justice Marshall, concurring, conclude that the double jeopardy clause absolutely prohibits an increased sentence:

> Although I agree with the Court as to the reach of due process, I would go further. It is my view that if for any reason a new trial is granted and there is a conviction a second time, the second penalty imposed cannot exceed the first penalty, if respect is had for the guarantee against double jeopardy.
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> *Id.* at 727.

believed justified the longer sentence. Essentially, two factors were relied upon: first, that the defendant was impeached by his testimony at the previous trial and, second, that his testimony concerning Schang's solicitation of perjury was a fabrication on the part of the defendant. With respect to the impeachment of the defendant, we do not believe that sufficient discrepancies were revealed to warrant the additional sentence. The second trial occurred three years after the first and it is understandable that defendant was unable to recall the events in the same detail as he had at the first trial. When the defendant was confronted with his prior testimony, he acknowledged that his memory of the details was not good but admitted that if he had testified to something in the prior trial, it was correct. Similarly, the defendant's allegation of Schang's solicitation, even if perjurious, constituted no new fact upon which a more severe sentence could be predicated since the same testimony was given at the first trial. No "identifiable conduct," *Pearce* at 726, subsequent to the first sentencing having been found upon which the increased sentence could be based, the mandate of *Pearce* was not complied with. In the exercise of our supervisory powers, we have concluded that under the guidelines in *Pearce* a sentence of more than five years would be excessive and should not be allowed to stand.

For these reasons, the conviction is affirmed and the cause is remanded to the district court for re-sentencing in conformance with this opinion.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 23, 1971.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 18451 vs.

MORRIS SALETKO,

Defendant-Appellant.

IT IS ORDERED by the Court that the petition for rehearing filed in this appeal be and the same is hereby denied.

No. 71-944

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

MORRIS SALETKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-944

MORRIS SALETKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possession of goods stolen from interstate commerce, knowing them to have been stolen, in violation of 18 U.S.C. 659. He was sentenced to eight years' imprisonment. The relevant facts are set out in the opinion of the court of appeals which affirmed (Pet. App. A 1-13).

Petitioner contends that there was an improper limitation on his right to cross-examine a government

witness as to his present address and place of employment, and that instructions he proffered regarding the credibility of a witness should have been given. These claims are answered in the thorough opinion below on which we rely.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

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[1] In addition to the cases cited on the failure to permit disclosure, see *United States* v. *Lawler*, 413 F. 2d 622, 627 (C.A. 7), certiorari denied, 396 U.S. 1046. With respect to the giving of the challenged instruction that the jury could consider the defendant's interest in the outcome of the case as bearing on his credibility, see *Nelson* v. *United States*, 415 F. 2d 483, 487 (C.A. 5), certiorari denied, 396 U.S. 1060.

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